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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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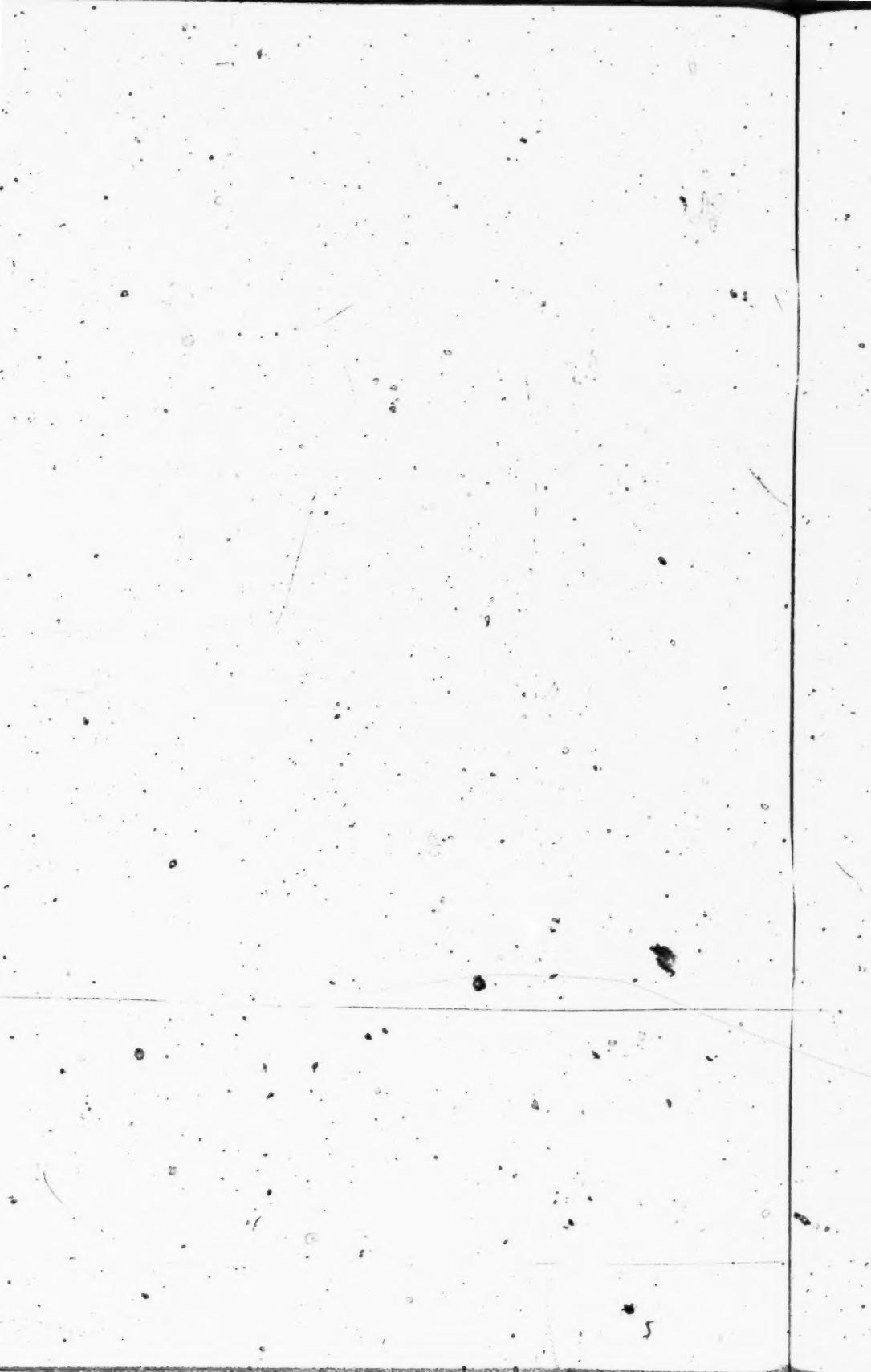
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Statement of the Case and Facts

The brief for the respondent contains a number of incorrect and misleading factual statements. We wish to correct several of the more serious of these errors.

- 1. On page 41 of its brief the attorneys for the government made the statement that petitioner was arrested and detained by police in the Alton Police station house on a "hit-and-run" charge which, as they put it, "is hardly a minor traffic violation." Since the arrest was for more than a minor traffic violation, they reason, the search of his person to discover any concealed weapons was justified.

There is a major flaw in this reasoning—petitioner was not arrested for “hit-and-run,” as is claimed, but for a minor traffic offense. Alton policeman Charles Stahl, the arresting officer, testified before the United States District Court for the Southern District of Indiana, that the arrest, on December 16, 1963, following Kaufman’s accident in Alton, was for a traffic violation—reckless driving, for driving too fast for road conditions (page 20, transcript of pre-trial and trial proceedings in *U. S. v. Kaufman*, No. I. P. 64-Cr.-31, February 28, 1966).

2. At the bottom of page 19 and top of page 20 the government states:

“ . . . At the time the F.B.I. agent searched the automobile, it was known that it had been used as an instrumentality in the commission of a federal offense and that it did not belong to petitioner but had been rented by someone else. The automobile, therefore, was properly taken into custody; it was to be retained by federal authorities and then returned to its owner. The reason the car was seized, and the reason it was searched, were all the same. In almost identical circumstances this Court upheld a warrantless search in *Cooper v. California*, 386 U. S. 58.”

It is true that the car had been rented in the name of Arthur Cooper, a friend of Kaufman’s, in New York. However, as was pointed out in the Brief for Petitioner (pages 44 and 45), the car was rented by Cooper for Kaufman’s use and benefit, Kaufman had sent money to Cooper to extend the lease on the car, and Kaufman was fully entitled to use the car. Under these circumstances, the mere

fact that the car had been rented in Cooper's name did not entitle the F.B.I. to search it without a warrant in the Cliff Martin garage, where it had been impounded by the Alton City Police.

The government has erroneously implied, in the above-quoted excerpt, that, at the time F.B.I. agents searched the car without a warrant and seized evidence which was subsequently introduced against petitioner at his trial, the car had already been "seized," "taken into custody" by federal authorities and was in the process of being "retained by federal authorities" for the purpose of being "returned to its owner." These claims are completely unfounded. At the time the F.B.I. agents searched the car on the evening after the crime, the car was still located in the Cliff Martin garage, where it had been taken at the direction of officer Stahl of the Alton Police Department after he had arrested Kaufman for the traffic violation of reckless driving. It was impounded as a result of the arrest for reckless driving (A. 55), not because the car was an "instrumentality in the commission of a federal offense." The car was sent to the garage because it could not be left on the street. There is no showing in the record that the Alton Police had a right to impound the car other than for Kaufman's convenience. There is nothing in the record to indicate that, as of the time of the F.B.I. search, the Alton Police had transferred the car or their responsibility for or authority over the car (if they had such responsibility or authority), to the F.B.I. It cannot be said, therefore, that the search of the car was in any way similar to the search involved in *Cooper v. California*. There, officers arresting the defendant on a narcotics violation seized the car under state law which required them to do so due

to the fact that the vehicle had been used in the transportation of narcotics. Under the statute the police were required to hold the vehicle as evidence until "forfeiture has been declared or a release ordered." They searched the car a week after the arrest and found incriminating evidence. The police were not only authorized but required under state law to maintain a degree of control and possession during the forfeiture proceedings which was almost tantamount to title in the car. Under these circumstances the search was valid and was upheld by this Court. The F.B.I. had no such interest in the Kaufman car at the time it was searched.

3. In the original Brief for Petitioner in this case it was alleged that, during their search of petitioner's car, the F.B.I. found a receipt showing that the pistol used in the robbery had been purchased at Wittel's Gun Shop in Alton; that Wittel's Gun Shop and witness John Davis may have been connected to the robbery, traced and located by the F.B.I. through the use of this receipt; and, further, that if the search of the car was unlawful, as is claimed by petitioner, the entire testimony of John Davis was tainted as the "fruit" of an illegal search and seizure and should not have been introduced against Kaufman.

On page 25 of the brief for the government it is stated that the receipt referred to was found *on petitioner's person* by the Alton Police, *not in his car*, and is listed in the inventory of items which the Alton Police obtained in the search of his person and turned over to the F.B.I. In support of this statement, in footnote 7 on page 25, the government refers us to pages 84 and 85 of the printed Appendix in this case. There is a receipt referred to on those pages of the Appendix which fits the description of

the receipt on page 25 of the government's brief—"a receipt of Harold Kaufman for receipt of \$29.53." However, as is evident from a reading of page 82 of the Appendix, this receipt in the amount of \$29.53 which was listed in the inventory of items taken from Kaufman's person *was actually a receipt given to Kaufman by the police or F.B.I. for the difference between the total amount of money found on Kaufman's person after his arrest and the proceeds of the robbery. The receipt referred to on pages 82 and 84, thus, was not a receipt for purchase of the pistol*, as has been claimed by the government.

Petitioner still asserts that, to the best of his recollection, the receipt for the gun was obtained by the F.B.I. during the search of the *car*, not through the search of his person.

4. On page 39 of its brief the government makes the following statement:

" . . . The evidence seized from the car was plainly immaterial to [the defense of insanity] and did not warrant counsel's challenging its admission by motion to suppress Since petitioner has shown himself fully alert as to his legal rights, *that strategy manifestly met with his approval . . .*" (Emphasis added)

There is nothing whatever in the record to indicate why Kaufman's trial attorney failed to file a motion to suppress evidence prior to trial. There is nothing in the record to indicate that there was even a conscious or deliberate decision on the part of counsel to forego the filing of a motion to suppress, and there is certainly no indication in any part of the record that Kaufman consciously or de-

liberately approved such a decision even if one were, in fact, made by counsel. The trial judge below in the evidentiary hearing on the motion to vacate under 28 U.S.C. § 2255 declined to allow the development of a full record on the search and seizure issue and, as a result, we have no knowledge why the motion to suppress was not made prior to trial. The above-quoted statement in the brief for the government, therefore, is inaccurate and extremely misleading.

5. In Kaufman's direct appeal from his conviction his appointed appellate attorney, Walter E. Diggs, Jr., did not formally raise the issue of whether Kaufman had been convicted illegally on the basis of evidence obtained through unlawful search and seizure. In his petition for writ of certiorari to this Court during 1965-66 (No. 1025, Misc., O.T. 1965), the search and seizure issue was raised.

The government states, on pages 19 and 39 of its brief, that counsel on appeal considered the search and seizure issue to be entirely without merit, and on page 12 it is stated that the 1965-66 petition for certiorari was a *pro se* petition. By these statements the government leaves the impression that, during the direct appeal and the subsequent proceedings for certiorari in this Court, Kaufman was the only person involved in the case who thought that the search and seizure issue had any merit—that no legally trained person saw any merit whatever to the issue during the 1965-66 proceedings. Actually, however, the certiorari proceeding was not a *pro se* proceeding, for Kaufman was represented by attorneys Robert O. Hetlage and Walter E. Diggs, Jr., the latter being the same attorney who had been involved in the direct appeal. Because he raised the

search and seizure issue in the certiorari proceedings, it is clear that Mr. Diggs, at that time, was of the belief that the search and seizure contention had merit.

ARGUMENT

I.

On page 23 of their brief the attorneys for the government make the statement that the evidence presented in petitioner's behalf on the sole issue involved at his trial—the issue of insanity—was "far from compelling." This statement is untrue, as will be shown by the following brief summary of evidence favorable to Kaufman on the question of insanity.

Dr. Glotfelty, a psychiatrist who had been practicing that specialty for 18 years, examined Kaufman at the United States Medical Center, Springfield, Mo., during the early part of 1964. He testified that he and Doctors Rothstein and Weiland, at the Center, had concurred in a diagnosis of schizophrenic reaction, paranoid type in partial, rather stable remission (Tr. 225).

Dr. Waitzel, a psychiatrist, had diagnosed Kaufman in 1960 (Tr. 263) and at that time had entered a diagnosis of psychoneurotic reaction, other (severe) (Tr. 270). He had found Kaufman to have low self-esteem (Tr. 287), and an underlying schizoid personality (Tr. 279). He testified that in the life history of a schizophrenic person there is generally a pre-existing schizoid personality (Tr. 279). He had found Kaufman to have weak control over his impulses (Tr. 303), and was convinced, in 1960, that psychosis (a paranoid type of schizophrenia) could develop in Kauf-

man's case in the absence of treatment (Tr. 280). Based on the 1960 evaluation, plus Dr. Glotfelty's 1964 diagnosis, plus his own observations during the trial, Dr. Waitzel testified that although Kaufman could have distinguished right from wrong on December 16, 1963, he could have been subject to such severe anxiety and pressure on that date that he would have been incapable of controlling an impulse to commit a crime he knew to be wrong (Tr. 293-295, 305, 313-316).

Patricia Scott first met Harold Kaufman in August, 1963, when he obtained her release from jail on bail (Tr. 128, 132). At the time she was in her sixth month of pregnancy, by some other man (Tr. 132), but in spite of this and in spite of the fact that he had just met her, he asked her to marry him (Tr. 137). She declined the offer. They shared an apartment for one and one-half weeks, and after that continued to live in the same building for several months and see each other constantly (Tr. 130, 131). He constantly told her that he loved her and wanted to marry her, but she never told him she loved him and she tried to make him leave her alone (Tr. 137, 163, 167). She told him that she'd marry him if he would give her \$10,000 because that is what it would take for her to live with him, and he responded by saying that he would raise the money (Tr. 137). Even though they lived together, they never had sexual relations (Tr. 167, 168). He was extremely jealous (Tr. 178) and when away from home would telephone her every half hour, all day long (Tr. 133). He kept telling her that he was more of a "man" than any of her previous lovers (Tr. 134, 162, 163, 168). He bragged what a famous criminal he was and his ambition was to make the F.B.I.'s "Ten Most Wanted" list (Tr. 150). He thought the police

were always following him (Tr. 151, 153). He gave all of his money away to others and never spent any money on himself (Tr. 136). He was extremely untidy (Tr. 136, 158, 159), and was a very poor driver (Tr. 163). She testified that he couldn't carry on a coherent conversation, and couldn't seem to remember anything said to him (Tr. 160). In her opinion, he was not sane (Tr. 171), and could not control his actions (Tr. 168).

Joseph Kiernan, a police detective, testified concerning the pressures to which Kaufman had been subjected prior to the crime, including his fear of death at the hands of a hoodlum (Tr. 192, 193, 215).

Even the prosecution's psychiatric witness, Dr. Weiland, gave a diagnosis of schizophrenic reaction, paranoid type in partial, rather stable remission (Tr. 334, 335), and admitted on cross examination that it was possible that Kaufman may have been at a stage in which he may not have been able to control his actions (Tr. 345).

II.

Four items obtained by the F.B.I. during their search of the car—a New York traffic ticket, receipts for gasoline, and a Western Union receipt—were introduced in evidence against Kaufman, over objection by his attorney, and these items were later commented upon by the prosecutor during his closing argument to the jury on the issue of insanity. It is petitioner's position that the misuse of these items in this manner seriously prejudiced him before the jury on that issue (Brief for Petitioner, pages 9-12, 42, 48).

As of the time of closing argument the defendant had presented evidence to establish his insanity. The prosecu-

tion had rebutted this with testimony of Dr. Weiland, a psychiatrist, who, although he diagnosed defendant's condition as schizophrenic reaction, paranoid type in partial, rather stable remission, stated that defendant could distinguish right from wrong (Tr. 335) and that he could find no evidence one way or the other whether, on the day of the crime, defendant had been unable to refrain from doing a wrongful act (Tr. 337, 342, 343, 345). The prosecution also produced a Dr. Davidson, a medical doctor but not a psychiatrist, who had examined Kaufman in F.B.I. headquarters at 9:00 p.m. on the day of the crime and who testified that, at that time, Kaufman appeared to be logical and coherent (Tr. 363, 364), and calm (Tr. 365). By its own count (see pages 26 and 27 of the government's brief) the government paraded before the jury a total of eight witnesses who had observed Kaufman on or about the day of the crime, all of whom testified concerning his *outward appearance of rationality* at that time. These witnesses testified that Kaufman "talked normally," "appeared not to be nervous," "appeared to be calm," "coherent," "logical," and "rational" in his speech and actions (for example, see A. 43, 52, 93, 96, 111, 119-121). We repeat, the emphasis in the use of these witnesses was on Kaufman's *actions, speech, and outward conduct*.

The legal test for determining insanity at the time of a crime is, of course, *subjective* rather than *objective* in nature. The outward appearance and conduct of the defendant, at or about the time of the offense are relevant in the determination of insanity, but the ultimate test is the *subjective test of mental capacity*, the question of whether the defendant, at the time in question, had the mental capacity to entertain or formulate the criminal intent which is a basic element in any true crime.

It is true, of course, that evidence of outward appearance and conduct has some relevance as shedding light on a defendant's inner thought processes. However, it is also true that evidence that a defendant appeared to be calm, coherent, outwardly rational, and able to plan his activities at or about the time of his crime is, in many cases, completely consistent with insanity. For example, the person who believes X is going to kill him unless he first kills X, or the person who hears voices from God telling him to kill Y may deliberately, coolly, calmly plan and execute these crimes and may outwardly appear to be rational at the time, and yet be thoroughly insane under the existing legal tests for insanity. Therefore, evidence by lay witnesses such as those used by the prosecution, showing apparent outward rationality, must be presented to a jury with extreme caution so as not to leave the impression that these outward appearances, alone, establish sanity.

The prosecutor in the Kaufman case, in his argument to the jury on the insanity issue, referred to Patricia Scott's testimony that Kaufman had left New York for the purpose of "pulling a job" (A. 124), and that when he arrived in the St. Louis area he had stopped in Alton and purchased a revolver, using a false name (A. 123). This argument showed that Kaufman may have deliberately planned to commit a crime and been calm and outwardly rational throughout, but this is not inconsistent with his claim of insanity. He could have been quite insane, under the legal tests for insanity, at the time of the crime, and still have appeared to be quite deliberate, calm and rational to those who observed him.

In his closing argument, immediately before making the references to the four items of evidence described above, the prosecutor made the following statement:

" . . . The only issue now remaining in the case is whether or not the defendant was legally sane . . . "

" . . . I would like to . . . remind you it's a question of his insanity on December 16, 1963. Was he legally sane on that date? That is the question for you to determine. You may consider all of the evidence which has been introduced, but you come right back to the focal point, was he legally sane and criminally responsible for his act on December 16, 1963?

"In order for you to determine that, you *must* examine *what he did, how he did it, what were his actions*, what was his *condition* at that time. You may also consider *acts* previously, and *acts* after December 16, but you come right back to the point of what was his *condition* on December 16, 1963." (A. 123) (Emphasis added)

As has previously been indicated, the prosecutor had introduced in evidence a great mass of repetitive, cumulative evidence of witnesses who had testified as to Kaufman's outward appearance or condition of calmness, coherence and rationality at or about the time of the offense. This, then, was the immediate context in which the prosecutor's references to the illegally obtained items of evidence were made—the jurors had already been saturated with evidence as to Kaufman's outward appearance and the prosecutor had just commanded that they *must* examine and consider this evidence in determining the issue of insanity. In effect, he had virtually substituted a new test or standard for determining insanity—a test predicated upon outward appearance or actions—in place of the traditional test based upon subjective mental capacity to formulate criminal intent. He then continued with his argument as follows:

"Now, we have introduced evidence showing that the automobile he was driving on December 16, 1963, came from New York. Here is Exhibit 8, the Rental Contract for that automobile in the name of Arthur Cooper. Here is a traffic ticket, City of New York. I am trying to find the date on this ticket. I had it at one time—on December 14 of 1963. We showed you receipts for gasoline along the route between New York and St. Louis. We have here a receipt from the Western Union showing telegraphing of the money from Harrisburg, Pennsylvania, to New York City, to Mrs. Patricia [sic] Scott, on December 15th.

"These are some of the things showing what he was *doing* when he was coming from New York to St. Louis in this automobile. . . ." (A. 123) (Emphasis added)

In the context in which this portion of the closing argument was made, the importance of outward physical acts on the issue of insanity had been greatly distorted and the significance of such acts as a guide in determining subjective mental capacity to entertain criminal intent had been made extremely unclear. In fact, the jury had been told, in effect, that if the outward conduct and appearance of the defendant was rational on or about the day of the robbery, he should be considered legally sane—that this is the sole criterion for determining sanity. In this immediate context, the evidence commented on by the prosecutor, showing that Kaufman was apparently rational enough to travel half way across the country, buy gasoline, telegraph money to his girl friend, etc., during the two days before the robbery, takes an increased significance in the

case. Before the jury, then, the evidence took on a significance on the insanity issue all out of proportion to its actual probative value, and the use of the evidence in this way was extremely prejudicial to the defendant.

The importance, from the prosecutor's standpoint, of the four illegally-obtained items of evidence which he referred to during the closing argument, is apparent from the following excerpt from the same prosecutor's brief in the direct appeal of the Kaufman case to the United States Court of Appeals for the Eighth Circuit:

“ . . . There is no evidence in the record that any mental defect the defendant might have was operative during the commission of the robbery. On the contrary, he left New York for the express purpose of committing a robbery for Christmas. The acquisition in New York City of the automobile used in the robbery in St. Louis, the driving of the automobile from New York City to St. Louis, the acquisition of the pistol used in the robbery, the mode and manner in which the robbery was committed, all indicate rational acts committed in furtherance of the original purpose coolly conceived of committing a robbery for Christmas.”
(Appellee's Brief in *Kaufman v. U. S.*, No. 17,834, U. S. Ct. of Appeals, Eighth Circuit, page 17)

To summarize, during his closing argument, the prosecutor made misleading statements indicating to the jury that the fact that Kaufman left New York for the purpose of committing a crime, and the fact that he appeared outwardly to be rational, calm, coherent, etc. before, at and after the robbery made it almost mandatory upon them to

find that he was sane at the time of the crime, even though this is not a *correct* application of the law of insanity. In this immediate context the prosecutor also referred to items of evidence which had been obtained through an illegal search and seizure, which showed that Kaufman had driven all the way from New York to St. Louis, had stopped along the way, purchased gas, sent a telegram, etc. In this context, in which the importance of actions and outward conduct of the defendant had been improperly stressed by the prosecutor, the references to the evidence concerning the trip from New York took on a significance on the issue of insanity which was much greater than the significance which it should have been accorded by the jury, based on its actual probative value.

III.

The attorneys for the government suggest (pages 32-34 of their brief) that in the area of Fourth Amendment rights there may be situations in which a state inmate may be entitled to relief in a federal court on habeas corpus while his counterpart in a federal institution may be denied relief under 28 U.S.C. § 2255 even though, presumably, the inmates have similar grounds for seeking collateral relief. Petitioner's position is that the difference in treatment would amount to an unconstitutional deprivation of the rights of the federal inmate in such situation. This argument was fully developed in the Brief for Petitioner, pages 23-28.

The government's suggestion is apparently based, at least in part, on the theory that state judges don't enforce federal rights, and that therefore state inmates need the protection of federal courts through habeas corpus, while

federal inmates have adequate protection of their constitutional rights by virtue of having been tried in federal courts and therefore don't need similar protection. This theory might be valid if all federal judges were perfect, but it is obvious that all judges, federal and state, being human, are capable of making mistakes in rulings on constitutional claims. Why, therefore, should a state inmate who has had a perfect trial before a state judge have any greater right to pursue his federal collateral remedy than a federal inmate whose trial judge failed to adequately protect his constitutional rights? It should further be pointed out that there are both state and federal inmates who have legitimate constitutional grounds for attacking their convictions, but whose grounds for relief are not supported by their trial records. In fact, the judges who tried them may not have been made aware of the existence of such grounds, during the trial stage. In these cases, no adequate review is possible through direct appeal, since the appellate court on direct appeal is limited to a consideration of only those matters which appear in the record. In such cases the only adequate relief available is the relief afforded through collateral attack, which allows the taking of new testimony and evidence and the development of the necessary additional record.

IV.

At present there is a conflict among the federal circuits on the question of whether and to what extent federal courts should consider search and seizure claims by federal inmates under 28 U.S.C. § 2255. (Brief for Petitioner, pages 20-23). The trial judge below, who had also been the judge at Kaufman's 1964 trial, in denying relief on the

search and seizure grounds raised in the 2255 motion, very briefly stated that the "record" did not substantiate the claim and, further, that search and seizure issues may be considered on appeal but not in a 2255 proceeding (A. 21). This ruling followed the strict rule in effect in the Eighth Circuit on this issue. Some of the other circuits follow more liberal rules.

The government apparently joins petitioner in disapproving of the harsh rule of the Eighth Circuit, for in its brief, at page 28, it praises the more liberal approach taken by the District of Columbia Circuit in *Thornton v. United States*, 368 F.2d 822 (D.C. Cir. 1966). That court indicated that a federal prisoner may be entitled to have his sentence set aside in a 2255 proceeding on a search and seizure ground, at least where exceptional circumstances are present which would require such result.

In our case, of course, the district court didn't consider special circumstances and never even got to the point of allowing petitioner to show the existence of special or exceptional circumstances. Petitioner was apparently not allowed to introduce new evidence and develop an additional record on his search and seizure issue or on the question of whether any exceptional circumstances were present in his case.

Of course, if the 2255 court below had allowed petitioner to present evidence to show such special or exceptional circumstances, petitioner would have been entitled to relief. For, as was explained in detail in the Brief for Petitioner (pages 12-15, 18, 19, 28-34), Kaufman was denied direct appellate review of his illegal search and seizure claims due to failure of his court-appointed appellate attorney to

raise these claims properly; through misleading advice by the clerk of the appellate court; and through failure of the court to consider the issue after it had been raised informally. This amounts to a deprivation of the right to effective representation by counsel. Under these circumstances, Kaufman should have been entitled to a delayed appeal and to have his case reviewed by the 2255 court as if on direct appeal [see *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962); and *Lyles v. United States*, 341 F.2d 917 (5th Cir. 1964), 346 F.2d 789 (5th Cir. 1965)]. In addition, he should have also had the option to present new evidence in support of his allegations, to supplement the trial record (see *Rosa v. United States*, 397 F.2d 401 (5th Cir. 1968)).

There are cases in which a prisoner should be entitled to raise search and seizure claims under § 2255 even in the absence of "exceptional circumstances" such as the denial of the constitutional right to counsel. For instance, if, after the trial, the defendant learns information or obtains evidence which would have been helpful to him in presenting his search and seizure claims at the trial, he should be allowed to present this newly discovered information or evidence in a 2255 proceeding. Another example of this might be the case of the defendant who, after waiving counsel, pleads guilty after being induced to do so by the knowledge that the police have overwhelming evidence against him, not realizing at the time that the evidence was illegally obtained and is therefore inadmissible.

Conclusion

Petitioner requests that the decision of the court below be reversed and that he be accorded the relief requested in his original brief.

Respectfully submitted,

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Certificate of Service

I, BRUCE R. JACOB, certify that on the day of November, 1968, I served copies of the foregoing brief, upon Miss Beatrice Rosenberg, Criminal Division, Department of Justice, Washington, D. C.
